85-1640

No. 85-

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JAMES M. DINEEN,

Petitioner

v.

MAINE BOARD OF OVERSEERS OF THE BAR,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Petitioner denied due process because the state District Court Judge, who heard and ruled on a motion to compel the Petitioner to withdraw from a case and which judge thereafter filed a complaint to the Board of Overseers of the Bar about Petitioner in the same case, had recused himself at an earlier time from sitting on and/or ruling upon any matters in which the Petitioner was a party or personally involved?

2. Was the Petitioner denied due process because the Maine Bar Rules, according to which the Petitioner was ultimately suspended from the practice of law for six months, fail to set out sufficient standards governing the enforcement of those rules and the sanctions to be imposed thereunder?

3. Do the Maine Bar Rules and the judgment of the Supreme Judicial Court of Maine in the case of *Board of Overseers of the Bar v. James M. Dineen*, 500 A.2d 262, Me. (1985) violate the Fifth and Fourteenth Amendments to the Constitution of the United States by having deprived the Petitioner herein of liberty and/or property without due process of law?

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IN THE

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No. 85-

JAMES M. DINEEN,

Petitioner

v.

MAINE BOARD OF OVERSEERS OF THE BAR,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

James M. Dineen hereby petitions this court to issue a writ of certiorari to the Supreme Judicial Court of Maine to review its judgment in *Board of Overseers of the Bar v. James M. Dineen*, 500 A.2d 262, November 4, 1985.

OPINIONS BELOW

The Order of March 17, 1983 of the Tenth District Court of Maine, Division of Southern York, Judge Roland A. Cole, in Docket No. 82-DV-155 is printed at App. pp. 41a -44a the Appendix (hereafter "App.") to this Petition. The Decision and Order of the Single Justice of the Supreme

Judicial Court of Maine in the matter of *Board of Overseers of the Bar v. James M. Dineen*, dated January *18*, 1985 in Docket No. *BAR-84-1* is printed at App. pp. 12a - 20a. The Decision and Order of the Supreme Judicial Court of Maine, sitting as the Law Court, in the same case is reported at 500 A.2d 262, and is reprinted at App. pp. 1a - 11a.

JURISDICTION

The Decision and Order of the Supreme Judicial Court of Maine was issued on November 4, 1985. On February 5, 1986, pursuant to a Motion for Enlargement of Time filed on January 31, 1986, Justice William J. Brennan, Jr. signed an Order extending the time for docketing on appeal in the within matter to and including April 3, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment to the Constitution of the United States provides:

> Section 1. All persons born naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

3. Maine Bar Rule 2(c) provides:

> *Grounds for Discipline.* Each act or omission by an attorney, individually or in concert with any other person or persons, which violates any of these rules shall constitute misconduct and shall be grounds for appropriate discipline notwithstanding that the act or omission did not occur in the course of an attorney-client relationship or in connection with proceedings in court. The failure without good cause to comply with any rule, regulation or order of the Board or the Grievance Commission or Bar Counsel shall constitute misconduct and shall be grounds for appropriate discipline.

4. Maine Bar Rule 2(d) provides:

> *Types of Discipline.* Discipline of attorneys may be: (1) by disbarment, suspension, or public censure by the Court; (2) by private reprimand by the Board or by the Grievance Commission; or (3) by informal admonition by the Bar Counsel.

STATEMENT OF THE CASE

The Petitioner herein is an attorney licensed to practice law before the Maine Bar. In that capacity, he represented Charles F. Ganem in many unrelated legal matters on a continuing basis from the mid-1970's until March of 1983. In the late summer or early autumn of 1982, Mr. Ganem sought the Petitioner's representation in a divorce action against his wife, Mary Judith Ganem. A divorce action was commenced by the Petitioner on behalf of Mr. Ganem on the grounds of irreconcilable differences. During the initial stages of the divorce proceedings, Mrs. Ganem was not represented by counsel.

At the outset of the divorce action, Mr. Ganem brought Mrs. Ganem to the Petitioner's office for the purpose of the Petitioner's setting down the terms of a divorce settlement that had been wholly and fully agreed to by the parties prior to their arrival in the Petitioner's office. Notwithstanding, however, the Petitioner acted out of an abundance of caution and, even as the Supreme Judicial Court of Maine stated, "Mr. Dineen also explained to the wife that if she wanted to retain another lawyer, she was free to do so." App. p.2a.

The only other occasion in the course of the divorce proceedings in which the Petitioner had any direct contact with Mrs. Ganem came some months later on or about December 22, 1982, when Mrs. Ganem made a telephone call to the Petitioner's office, wherein she requested that the Petitioner seek a continuance of the divorce trial date so she could retain separate counsel and contest the divorce. App. p.3a. As the Supreme Judicial Court of Maine wrote, "The Appellant (Petitioner in this proceeding) agreed to do so." App. p.3a.

In January, 1983, Mrs. Ganem obtained counsel of her own and thereafter her counsel filed in court a motion to compel the withdrawal of the Petitioner's appearance on behalf of Mr. Ganem.

On March 17, 1983, hearing was scheduled on a number of motions, including the motion to compel Petitioner's withdrawal, in the "Ganem" matter before Hon. Roland A. Cole, Judge of the Tenth District Court of Maine, Division of Southern York, Kittery, Maine. Judge Cole ruled adversely to the Petitioner and ordered the Petitioner to withdraw as counsel for Mr. Ganem and have no further involvement with either Mr. Ganem or Mrs. Ganem with regard to the pending domestic relations case. Judge Cole also made his Order the subject of a complaint about the Petitioner to the Maine Board of Overseers of the Bar (App. p.40a), wherein he made findings that the Petitioner had violated certain provisions of the Maine Bar Rules in his conduct in the Ganem matter. In response to Judge Cole's complaint, the Petitioner furnished the Bar Counsel with a vigorous reply which essentially denied every substantive allegation of misconduct made by Judge Cole. App. PP. 33a - 39a.

Thereafter, an Information was filed against the Petitioner(App.pp.29a-32a),the Petitioner filed a formal answer of substantive denial and otherwise (App. pp.25a-27a)and the matter was heard before a single Justice of the Supreme Judicial Court of Maine, Daniel E. Wathen. Notwithstanding the Petitioner's aggressive defense and denial to the contrary, Justice Wathen issued his Decision and Order on January 21, 1985 finding that the Petitioner's conduct violated the Maine Bar Rules in three areas: (1) Acceptance of employment, (2) Conduct during employment and, (3) Withdrawal from employment. App. 12a-20a. Justice Wathen ordered the Petitioner suspended from the practice of law for six months in all courts of the State of Maine. App. p.20a.

The Petitioner thereafter appealed the Decision of the single Justice to the full bench of the Supreme Judicial Court of Maine. That body upheld the finding of professional misconduct and the imposition of a six-month suspension from the practice of law against the Petitioner

in its Decision dated November 4, 1985. From that adverse decision the Petitioner has appealed to the United States Supreme Court. App. p.21a.

The Federal questions sought to be reviewed concern due process violation. The first such question concerns the fact that the Judge hearing the motion to compel the Petitioner's withdrawal of appearance on behalf of Charles F. Ganem, Hon. Roland A. Cole, had, at the Petitioner's request, recused himself on an earlier occasion in an unrelated matter from thereafter sitting upon any case in which the Petitioner herein was either a party himself or was otherwise personally involved. In view of the fact that Judge Cole not only sat on the matter after his own self-recusal, but complained to the Board of Bar Overseers about the Petitioner c ver the outcome, he was violating his own self-recusal and the Petitioner was irreparably prejudiced thereby. This point constituting a due process violation was specifically raised in the nature of an affirmative defense in the Petitioner's formal Answer (App.p.27a) which he filed in response to the Information which was filed against him by counsel for the Board of Overseers of the Bar. App. p.29a. This matter, however, was never passed upon or otherwise ruled upon either by the single Justice or by the full bench of the Supreme Judicial Court of Maine.

The other Federal question sought to be reviewed is whether the Maine Bar Rules, according to which the Petitioner's license to practice law in the State of Maine was suspended for six months by the single Justice and upheld on appeal by the Supreme Judicial Court, fail to set forth sufficient standards governing their enforcement and sanctions to be imposed pursuant thereto. On appeal from the single Justice to the full bench, the Petitioner argued orally and in his written brief that, inferentially, his right not to have his property taken from him without due process of law was being violated. The Petitioner accomplished this by arguing that none of his conduct had

provided grounds for his license to practice law to be suspended, and especially not for the inordinately long period of six months. The Supreme Judicial Court of Maine did not pass upon this matter at all in its Decision. App. pp. 1a - 11a.

ARGUMENTS SUPPORTING REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE PETITIONER WAS DENIED DUE PROCESS BECAUSE THE STATE DISTRICT COURT JUDGE, WHO HEARD AND RULED ON A MOTION TO COMPEL THE PETITIONER TO WITHDRAW FROM A CASE AND WHICH JUDGE THEREAFTER FILED A COMPLAINT TO THE BOARD OF OVERSEERS OF THE BAR ABOUT PETITIONER IN THE SAME CASE, HAD RECUSED HIMSELF AT AN EARLIER TIME FROM SITTING ON AND/OR RULING UPON ANY MATTERS IN WHICH THE PETITIONER WAS A PARTY OR PERSONALLY INVOLVED.

The District Court Judge, Roland A. Cole, who initially heard and ruled upon the motion to compel the Petitioner to withdraw his appearance as counsel for Mr. Ganem, sat on the case after he had on an earlier occasion and at the Petitioner's (herein) request recused himself from sitting thereafter on any case in which the Petitioner herein was a party or was otherwise personally involved.

Prior to becoming a Maine District Court judge, Roland A. Cole was an attorney practicing law in the same general locale as your Petitioner. His law firm had been involved in at least one law suit representing a party in litigation against the Petitioner herein. After Judge Cole was appointed to the bench, he sat on a succession of four or five cases in which the Petitioner herein was a party litigant. The Petitioner herein concluded that the decisions of Judge Cole had been very biassed and prejudiced against the Petitioner herein. As a result, the Petitioner requested that Judge Cole recuse himself from partici-

pating in any future case in which the Petitioner was a party or was otherwise personally involved in a capacity other than as counsel for a party. Judge Cole agreed and so recused himself.

In the "Ganem" matter which ultimately gave rise to the series of circumstances leading to this appeal and petition, although the Petitioner was technically counsel for one of the parties for the purposes of the Motion to Compel Withdrawal, he was effectively "on trial" himself. Based upon Judge Cole's earlier recusal as described, and especially in view of the fact that Judge Cole saw fit to make a multi-count complaint to the Board of Overseers of the Bar after the hearing on the Motion to Compel Withdrawal, it was especially incumbent and absolutely necessary that Judge Cole should not have sat on the matter at all. Not only was the appearance of bias and prejudice existent, but the actual existence of those conditions as well.

This issue is discussed in 48 *C.J.S.* § 98, wherein it is stated:

> "The underlying principle of rules for disqualification of judges is that no judge should preside in a case in which he is not wholly free, impartial or independent. . .and the law requires not only that a judge be impartial, but also that he appear to be impartial."

Also quoted in 48 *C.J.S.* § 98 in this regard is the case of *Dennis v. Sparks*, 101 S.Ct 183, 449 U.S. 24.

> "The right to a judge free from bias or prejudice is based on the due process clause of the Federal Constitution." *C.J.S.*, Constitutional Law § 569(4)

The case of *Rosen vs. Sugarman*, 357 F.2d 794 at 795 stated:

> "Even when a judge's initial adverse reaction to a lawyer may have stemmed from reasons that

> were legitimate or at least understandable, if such antipathy has crystallized to a point where the attorney can do no right, the judge will have acquired a bent of mind that may prevent or impede impartiality of judgment at least in a matter where attorney's private interests are at stake."

Had Judge Cole not taken any adverse action against the Petitioner herein as a result of hearing on the Motion to Compel Withdrawal of Appearance, the matter perhaps would not have amounted to anything more than harmless error. However, such was not the case. No one will ever know whether an impartial, disinterested judge would have made the same adverse finding as Judge Cole.

For all of these reasons, your Petitioner suffered severe prejudice by Judge Cole's having sat on the Motion to Compel Withdrawal, and, as a result, the Petitioner was denied due process of law.

II. THE PETITIONER WAS DENIED DUE PROCESS BECAUSE THE MAINE BAR RULES, ACCORDING TO WHICH THE PETITIONER WAS ULTIMATELY SUSPENDED FROM THE PRACTICE OF LAW FOR SIX MONTHS, FAIL TO SET OUT SUFFICIENT STANDARDS GOVERNING THE ENFORCEMENT OF THOSE RULES AND THE SANCTIONS TO BE IMPOSED THEREUNDER.

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III. THE MAINE BAR RULES AND THE JUDGMENT OF THE SUPREME JUDICIAL COURT OF MAINE IN THE CASE OF *BOARD OF OVERSEERS OF THE BAR vs. JAMES M. DINEEN*, 500 A.2d 262, Me. (1985) VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BY HAVING DEPRIVED THE PETITIONER HEREIN OF LIBERTY AND/OR PROPERTY WITHOUT DUE PROCESS OF LAW.

At the time of commencement of the Information against the Petitioner in the Supreme Judicial Court, those parts of the Maine Bar Rules treating grounds for discipline were as follows:

> Rule 2(c).
> *Grounds for Discipline.* Each act or omission by an attorney, individually or in concert with any other person or persons, which violates any of these rules shall constitute misconduct and shall be grounds for appropriate discipline notwithstanding that the act or omission did not occur in the course of an attorney-client relationship or in connection with proceedings in court. The failure without good cause to comply with any rule, regulation or order of the Board or the Grievance Commission or Bar Counsel shall constitute misconduct and shall be grounds for appropriate discipline.
>
> Rule 2(d).
> *Types of Discipline.* Discipline of attorneys may be; (1) disbarment, suspension, or public censure by the Court; (2) by private reprimand by the Board or by the Grievance Commission; or (3) by informal admonition by the Bar Counsel.

The two sections of the Maine Bar Rules quoted above represent the entirety of language in the Maine Bar Rules on the subjects of grounds for discipline and types of discipline. The Petitioner argues that there are no standards set down in the rules or elsewhere to ensure the orderly administration of discipline of attorneys. There are no guidelines to establish whether a disciplinary sanction should be informal reprimand or disbarment; or, whether suspension from practice should be imposed, and if so, for how long.

The failure of the Maine Rules to contain such necessary standards means that each single Justice who hears a case involving attorney discipline is free to impose what-

ever arbitrary sanction he whimsically chooses to set.

While the Court at both the single Justice and appellate levels made certain findings of professional misconduct, albeit in rejection of the Petitioner's contentions, neither the judgment which has caused the appeal to this Court, nor that of the single Justice, give any explanation of how or why a six-month suspension from the practice of law was an appropriate sanction, or, for that matter, why a suspension rather than a public censure, private reprimand or informal admonition would not have been a sufficient sanction. Nothing in the facts of Petitioner's disciplinary matter was so egregious or self-evident as to make a per se justification of a suspension for any period of time.

This Petitioner has argued that imposition of a six-month suspension from the practice or law under those appropriate provisions of the Maine Bar Rules already cited constitutes a denial of due process because no standards are set out in the rules. Likewise, the Petitioner argues that a license to practice law is a form of property, and therefore its taking without due process of law is unconstitutional and illegal by virtue of the Fifth and Fourteenth Amendments to the Constitution of the United States which state as follows:

> Amendment V.
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV.

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A license to practice law is a means of earning a living. It is a livelihood. Stripped of such a license, an individual would have no guarantee of being able to earn a similar living or enjoy a similar life. A license to practice law is, therefore, a property right.

Prior discussions in the Federal Courts of this country have adopted the argument that a license to practice law is a property right not to be divested through the abrogation of federally protected rights. *Erdmann v. Stevens*, 458 F.2d at 1210. *In Re Ming*, 469 F.2d 1352, 1353, 1355 (1972).

By comparison and reinforcement, the Petitioner points out that the Courts have also determined that the right to practice medicine is also a property right entitled to Constitional protection. *Green vs. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed 2d 1377 (1959). Likewise, the license of a chiropractor to practice his trade was held to be a constitutionally protected property right in *Tomanio vs. Board of Regents*, 603 F.2d 255 (1979).

Furthermore, other Federal Courts have held that the license to practice as a registered psychologist is also a property right protected Constitutionally. *Herz v. Degnan et al*, 648 F.2d 201 (1981).

CONCLUSION

For all of the reasons set forth hereinabove, the Petitioner asserts that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

MAINE SUPREME JUDICIAL COURT
BEFORE THE

REPORTER OF DECISIONS
DECISION NO. 3958

LAW DOCKET NO. YOR-85-86

BOARD OF OVERSEERS OF THE BAR
v.
JAMES M. DINEEN

Argued September 18, 1985
Decided November 4, 1985

Before NICHOLS, VIOLETTE, and SCOLNIK, J.J.,
and WERNICK, A.R.J. VIOLETTE, JR.

James Martin Dineen appeals from a decision and order of a single justice of the Supreme Judicial Court finding that he had violated several provisions of the Maine Bar Rules and, as a sanction, ordering his suspension as an attorney from the practice of law in all courts of the state for a period of six months. Appellant contends on appeal that the single justice erred in each of his several findings of violation of the Maine Bar Rules. We affirm.

I.

The charges against Mr. Dineen first arose as the result of legal services he rendered to a husband and wife in 1982. The testimony indicated that, prior to their marriage, the husband had been a regular client of appellant since the mid 1970s and that he had also rendered legal services to the wife. In the spring of 1982, the husband approached Mr. Dineen and explained that he and his

wife were considering getting a divorce. The husband mentioned the possibility of the appellant handling the divorce for both parties, thus eliminating the necessity of hiring two attorneys. Mr. Dineen told the husband that he could only handle the matter if the couple prepared a full agreement of their mutual understanding concerning the issues and terms of the divorce.

In July, 1982 the wife was charged on a civil complaint for operating a motor vehicle while under the influence of alcohol. (OUI). The husband retained Mr. Dineen as counsel for his wife and agreed to pay the legal fees. The OUI matter was tried on September 20, 1982. In preparation for the appellant's defense of the wife, the wife did not inform the appellant that she had a serious problem with alcohol abuse. At a time proximate to the pendency of the OUI trial, the husband and wife met with Mr. Dineen at his office to discuss their divorce settlement agreement. Mr. Dineen informed the parties that if any divorce issued remained in dispute, he could not continue to handle the matter. There is testimony by both the husband and wife, however, that Mr. Dineen, in fact, helped the parties work out some of the disputed terms of their agreement. He also explained to them the concept of division of marital property under Maine Law but did so in a manner that favored the husband. Mr. Dineen also explained to the wife that if she wanted to retain another lawyer she could do so. From this meeting the wife was under the distinct impression that Mr. Dineen was representing both her husband and herself in this "no fault divorce." The wife went to the appellant's office one additional time for the purpose of being served, as defendant, with the divorce complaint. The complaint was signed by the husband as plaintiff and Mr. Dineen signed it as attorney for the plaintiff. The complaint alleged that the divorce was based on irreconcilable differences having "arisen between the parties which have caused the irremediable breakdown of the marriage."

In October, 1982, the wife admitted herself into the Seton Unit, Mid-Maine Medical Center in Waterville (Seton) for substance abuse rehabilitation. On December 14th, 1982, the husband brought a written divorce agreement prepared by the appellant to Seton for the wife to sign. She noticed that certain terms in the agreement had changed since the meeting between the appellant, her husband and herself: (1) the amount recited for the husband's child support payments was lower than that to which they had agreed, and (2) there was an added clause that allowed the husband to claim tax exemptions for their two minor children. The wife testified that, at this point, she formulated the opinion that she had been misled by the appellant's explanation of what constituted "marital property." She signed the agreement in spite of her misgivings about some of its terms.

On December 22, the wife called Mr. Dineen and explained that she was at Seton undergoing treatment for alcohol abuse and that she was not ready to be released. She requested that the appellant seek a continuance of the divorce trial date so she could retain separate counsel and contest the divorce. The appellant agreed to do so.

On January 28th, 1983, after another attorney had filed an appearance on behalf of the wife, Mr. Dineen filed an amended divorce complaint on behalf of the husband. The amendment added an allegation that the wife was guilty of cruel and abusive treatment and "of gross and confirmed habits of intoxication from the use of liquor." On February 1st, 1983, the wife filed a motion to compel Mr. Dineen to withdraw from representing the husband. The grounds for the motion were based on: 1) Mr. Dineen's improper representation of both the husband and wife in the pending divorce action and, 2) the fact that the amended complaint improperly put into issue the wife's alcohol abuse at a time subsequent to appellant's representation of the wife on the OUI charge.

On February 3rd, 1983, Mr. Dineen, on behalf of the husband, was before the District Court, Kittery, moving ex parte for temporary custody of the minor children. The grounds included allegations concerning the wife's unfitness to care for her children because of her alcohol abuse. Before hearing the ex parte motion, the District Court judge became aware of the motion to compel Mr. Dineen's withdrawal. In chambers, the judge warned Mr. Dineen that his conduct was susceptible to charges of violation of the bar rules and suggested that he seriously consider withdrawing voluntarily from the case. The appellant disregarded the warning and continued to represent the husband.

A full hearing on the motion to compel withdrawal of Mr. Dineen was held on March 17, 1983. The District Court found that Mr. Dineen had violated the following Maine Bar Rules: Rule 3.4(b) (conflict of interest); Rule 3.4(c) (multiple employment); Rule 3.4(e) (protection of the interests of a former client); Rule 3.6l(1) (preserving secrets of a client); and Rule 3.6(m) (avoiding misreliance on a lawyer's opinion by one other than a client). The District Court ordered the appellant to cease representation of either party relative to the divorce action.

In June, 1983 Bar counsel for the Board of Overseers of the Bar filed a petition with the Grievance Commission of the Maine Bar, pursuant to M. Bar R. 7(e) (2), charging the appellant with misconduct. After hearing, the Commission found tht appellant's conduct was in violation of Bar Rules 3.4(a) and (b). The Commission recommended that an information be filed with the Supreme Judicial Court to investigate the matter and that, if the Court determined that violation of the Bar Rules had occurred, the appellant be sanctioned. Counsel for the Board of Overseers of the Bar proceeded to file an Information charging the appellant with violations of Maine Bar Rules 3.4(a), (b), (e), 3.6(l) (1) and 3.5(b) (2) (ii). After a full evidentiary hearing before a single justice of the Supreme

Judicial Court, Mr. Dineen was found in violation of the Maine Bar Rules hereinafter set forth and, as a sanction, was suspended for six months from the practice of law in this state.

II.

In attorney disciplinary proceedings, the function of the Law Court is to review inferences drawn by the single justice from the evidence presented at hearing, and to uphold his findings unless they are clearly erroneous. *Board of Overseers of the Var v. Dineen,* 481 A.2d 499, 502 Me. 1984). The single justice found that Mr. Dineen's conduct violated the Maine Bar Rules in three areas: (1) acceptance of employment, (2) conduct during employment and, (3) withdrawal from employment. Specifically, the single justice found violations of Maine Bar Rules 3.4(a), (b), (c), (d) and (e); 3.6(l) (1) and (m) and 3.5(b) (2) (ii).[1]

At the outset, the single justice determined that an attorney-client relationship was established between Mr. Dineen and the wife, and that Mr. Dineen gave the wife legal advice pursuant to that relationship. Mr. Dineen denies the existence of such a relationship and asserts that there is no evidence in the record that the wife relied upon his legal advice on matters pertinent to the divorce. The term 'client' includes one who is either "rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him." M.R. Evid. 502(a) (1). Moreover, "(a)n attorney-client relationship does not require the payment of a fee or formal retainer but may be implied from the conduct of the parties." *See Matter of McGlothlen,* 663 P.2d 1330, 1334 (Wash. 1983). The record supports the

[1] We do not address the single justice's finding that the appellant violated M. Bar R. 3.4(c), because the appellant did not challenge the finding on appeal.

single justice's finding that the wife reasonably believed she had consulted the appellant and relied upon his advice with respect to the early divorce process. Furthermore the wife's expressed belief that an attorney-client relationship existed was heightened by the fact of the appellant's contemporaneous representation of her during the OUI proceedings. *ID.*[2]

III.

Turning now to the first broad area of violation, regarding acceptance of employment, the single justice found that Mr. Dineen's conduct violated Rule 3.4(a), which provides:

> (a) Disclosure of Interest. Before accepting any professional employment a lawyer shall disclose to the prospective client his relationship, if any, with the adverse party; his interest, if any, in the subject matter of the employment; all the circumstances regarding his relationship to the parties; and any interest or connection with the matter at hand that a lawyer knows or reasonably should know would influence the client in the selection of a lawyer.

[2]Assuming *arguendo,* as did the single justice, that an attorney-client relationship was not established, the appellant's conduct would still be in violation of M. Bar R. 3.6(m) which provides:

> *Avoiding Misreliance.* If a lawyer knows or should know that his advice or opinion may be communicated to a person other than his client, he shall take reasonable steps to prevent that person from believing that the lawyer represents his interests as well as the interests of his client.

By virtue of the meeting that took place betwen the appellant, the husband and the wife, in which the terms of the divorce were discussed, it is clear that the appellant knew the wife was present and knew that his advice and opinions were being communicated to her. The appellant testified that he did not take any steps to prevent the wife from believing that he did not represent her interests. He stated he did not think he had to do so.

M. Bar. R. 3.4 (a).

The appellant asserts that the wife was aware of the long standing relationship between the appellant and her husband, and such awareness made disclosure unnecessary. We find that the record supports the single justice's finding that the appellant failed to adequately disclose to the wife *the exact nature* of his relationship to the husband, who was a party adverse to the wife. Further, he failed to disclose the circumstances regarding his relationship to the parties. The evidence reveals that the appellant initially informed the parties that he could "only get involved in this" matter if they came to a full understanding on the terms of the divorce prior to meeting with him. The evidence supports the conclusion of the single justice that in the event of a disagreement, the appellant, if necessary, would be acting with the intent of furthering the husband's interests at the expense of the wife's. Certainly, the events that occurred in early 1983, namely the amendment of the comlaint, the filing of an ex parte motion for temporary custody and the failure to withdraw, fully bear out such intent on his part. Moreover, it is clear that Mr. Dineen should have known that proper disclosure of the exact nature of his relationship with the husband would have an influence on the wife's decision to retain her own counsel, as she subsequently did.

The single justice next found a violation of Rule 3.4(b). That rules states:

> (b) Conflict of Interest. A lawyer shall not accept employment if the exercise of his independent professional judgment in behalf of a client will be, or is likely to be, adversely affected by the acceptance of such employment, or if it would be likely to involve him in representing differing interests, except to the extent such employment is permitted by subdivision (d) of this rule.

M. Bar R. 3.4(b).

Mr. Dineen contends that he was not consulted as a lawyer in the divorce matter, but rather, fulfilled the function of a scrivener. Thus, given the nature of this limited role in relation to the parties, nothing existed to warrant a conclusion that he was representing differing interests. The testimony of both the husband and wife conflict with the appellant's characterization of his role. Their testimony shows that, in fact, the appellant gave legal advice to both parties concerning the terms of their divorce settlement agreement and that, ultimately, certain terms of the agreement were changed to favor the husband's interests over the wife's. The record supports the finding by the single justice that by agreeing to undertake representation of both the husband and wife, the appellant violated Rule 3.4(b) because his "judgment was likely to be 'adversely affected by the acceptance of such employment' and was 'likely to involve him in representing differing interests. . .' Under the circumstances presented in this case, Mr. Dineen should have perceived the inherent conflict of interest occasioned by his representation of differeing interests is permitted when:

> it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each.

M. Bar R. 3.4(d).

The single justice correctly noted that it was not obvious that appellant could adequately represent each client. The appellant did not address this particular finding but did contend that the wife's awareness of his representation of the husband amounted to an acquiescence tantamount to consent. To the contrary, we agree with the single justice that Mr. Dineen "failed to make full dis-

closure of the effect on his judgment of his multiple representation."

Lastly, we uphold the single justice's finding that appellant violated Rule 3.4(e). That rule provides:

> (e) Interest of Former Client. A lawyer shall not accept employment adverse to a former client without that client's informed written consent if such new employment involves the subject matter of the former employment or may involve the use of confidential information obtained through such former employment.

M. Bar R. 3.4(e).

The wife was not only a current client for purposes of the divorce proceedings, but she was also a former client stemming from the OUI representation. Mr. Dineen argues there was no evidence to warrant a finding that he knew of facts which would lead to a violation of Rule 3.4(e). Contrary to this contention, we agree with the single justice's finding that the confidential information the appellant obtained from the wife during the OUI representation could foreseeably be put to use in the divorce action. Thus, the wife's written consent was clearly required before the appellant accepted employment from or continued to represent the husband. By his own admission, Mr. Dineen failed to obtain such consent.

IV.

We now address the finding by the single justice respecting Mr. Dineen's conduct during representation. Rule 3.6(l) (1) provides that:

(1) Preserving Confidences and Secrets.

> (1) Except as permitted by these rules or as required by law or by order of court, a lawyer shall not, without the informed written consent of the client, knowingly reveal a confidence or secret

> of his client; use such a confidence or secret to the disadvantage of his client; or use such confidence or secret to the advantage of himself or a third person.

M. Bar R. 3.6(l) (1).

The single justice found that "(w)ithout obtaining the informed consent of the wife, (appellant) used information he received from her." The use to which appellant put the information is reflected in the amended divorce complaint tht charged the wife with "gross and confirmed habits of intoxication from the use of liquor." The critical issue here is whether Mr. Dineen first gained the secret or confidence, regarding the wife's alcohol problem, from the wife or from the husband. Mr. Dineen alleges that the wife did not disclose her alcohol problem to him during the telephone conversation on December 22, 1982; rather, that he learned of her condition from the husband in January, 1983. The single justice found that the appellant first gained this information from the wife in December, 1982, at a time when the wife believed she was still represented by the appellant. Once having gained the information, the appellant then used the secret to the wife's disadvantage and to the advantage of a third party, namely, the husband. Although the record discloses conflicting testimony regarding this issue, after carefully reviewing the evidence, we conclude that the inference drawn by the single justice is adequately supported by competent evidence. We uphold the finding of a violation of Rule 3.6(1) (1).

V.

Finally, we address the finding that appellant violated Rule 3.5(b) (2) (ii), which states:

> (b) Mandatory Withdrawal.
>
> (2) A lawyer representing a client before a tribunal, with its permission if required by its

> rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from emloyment if:
>
> (ii) He knows, or should know, that his continued employment will result in violation of these Rules;

M. Bar. R. 3.5(b) (2) (ii).

Mr. Dineen asserts that nothing in the record indicates that he knew or should have known that his continued employment would result in a violation of any of the Bar Rules. We agree with the single justice that certain events signaled to the appellant that he should have withdrawn. For instance, the fact that the appellant used the wife's secrets after receiving knowledge that she sought severance of (appellant's) connection with the divorce proceedings. A further fact that should have alerted the appellant that withdrawal was necessary was the advice given by the District Court judge that he withdraw from the case. We agree with the single justice that it was "particularly egregious that Mr. Dineen elected to ignore such advice." The finding that appellant violated 3.5(b) (2) (ii) is supported by competent evidence in the record, and therefore, not clearly erroneous.

The entry is:

Judgment affirmed.

All concurring.

Attorneys for Plaintiff:
J. Scott Davis, Esq.
(orally)
Board of Overseers of the Bar
P.O. Box 1820
Augusta, Maine 04330

Attorneys for Defendant:
James J. Fitzpatrick, Esq.
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James M. Dineen, Esq.
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Kittery, Maine 03904

STATE OF MAINE
BEFORE THE
SUPREME JUDICIAL COURT

DOCKET NO. BAR-84-1

BOARD OF OVERSEERS OF THE BAR
v.
JAMES MARTIN DINEEN

DECISION and ORDER

This proceeding, by information, is brought by the Board of Overseers of the Bar, acting through Bar Counsel, pursuant to 4 M.R.S.A. § 851 *et seq* (1979 and Supp. 1984-1985) and M. Bar R. 7(e) (6), relative to the conduct of respondent James M. Dineen, as an attorney at law duly admitted to practice law in the State of Maine. The information charges that respondent has conducted himself in a manner unworthy of an attorney admitted to the Bar of this State. Specifically, respondent is charged with violating five provisions of the Maine Bar Rules' Code of Professional Responsibility, M. Bar R. 3.4(a), 3.4(b), 3.4(e), 3.5(b) (2) (ii), and 3.6 (l) (1).[1]. Respondent denies any violation and asserts that the information fails to set forth a claim upon which relief can be granted. Therefore he prays that the information be dismissed.

The Court concludes that respndent has conducted himself in a manner unworthy of an attorney.

[1]A Justice judging the conduct of an attorney against the Code of Professional Responsibility is not limited, absent surprise or other prejudice, to the disciplinary information filed pursuant to the Maine Bar Rules. *See Board of Overseers of the Bar v. Rodway*, 462 A.2d 1062, 1064 (Me. 1983).

I.

The complaint arises from the rendition of legal services to a husband and wife. Respondent has provided legal services to the husband on a regular basis since the mid 1970's. In the spring of 1982, the husband and wife discussed between themselves the possibility of obtaining a divorce and using the services of a single attorney. The husband spoke with respondent about the possibility of respondent's handling the divorce. He testified that respondent said that he could handle the divorce only if the couple had agreed to all the terms of the divorce before meeting with respondent. The husband further testified that his wife understood the conditional nature of respondent's handling of their divorce.

On August 8, 1982, respondent entered his appearance for the wife in a civil complaint brought against her for operating a motor vehicle while under the influence of alcohol. The husband obtained respondent's services on the OUI action and agreed to pay respondent's fee.

The couple met with respondent in his office to discuss the divorce while the wife's OUI trial was pending. At the meeting, respondent stated that if any matters remained in dispute, he could not involve himself in the divorce proceeding. He told the wife that she had the right to her own lawyer. The wife claims that respondent misled her as to the meaning of "marital property" and that she was told that her husband would make higher child support payments than the sum recited in the agreement eventually signed.

The OUI complaint was tried on September 20, 1982. In preparing her defense, the wife told respondent that she had drunk a couple of glasses of wine on the day she was stopped. At that time, she did not tell respondent that she had an ongoing drinking problem of serious magnitude.

After the OUI trial, respondent arranged for the wife to

return to his office at the end of September. When she arrived, she was served with papers naming her as the defendant in her husband's complaint for divorce. Respondent signed the complaint as attorney for the husband. The complaint alleged as the basis of the divorce that irreconcileable differences had "arisen between the parties which have caused the irremediable breakdown of the marriage. . ."

The wife had doubts about the tentative settlement terms that she and her husband had agreed to; nevertheless, on December 14, 1982, she signed an agreement that was intended to become part of a divorce judgment. Respondent prepared the agreement and it was presented to the wife by the husband. The agreement added a provision not agreed upon in the September meeting which gave the husband the right to claim tax exemptions for his two minor children.

When she signed the agreement, the wife was a resident in the Seton Unit in Waterville, taking part in a twenty-eight day alcohol rehabilitation program. While at Seton, the wife called respondent shortly before the divorce was to come to trial to seek a continuance of the court date so that she could obtain her own counsel and contest the divorce. She explained that she was hospitalized and that she could not be released without disrupting the treatment plan. Respondent agreed to a continuance on behalf of the husband.

On January 28, 1983 after the wife had hired a lawyer other than respondent to represent her, respondent filed an amended complaint for divorce on behalf of the husband. The amended complaint charged the wife with cruel and abusive treatment and "gross and confirmed habits of intoxication from the use of liquor." A few days after respondent filed the amended complaint, counsel for the wife filed a motion to compel respondent to withdraw his representation of the husband.

The pertinent bases for the motion to compel withdrawal were that respondent's representation of both parties in the pending divorce action was improper and that the amended complaint improperly injected the issue of the wife's drinking into the divorce, after respondent had represented her on an OUI charge. Respondent was in District Court on the husband's ex parte motion for temporary custody of his two minor children when the motion to compel withdrawal came to the attention of the presiding judge. The District Court warned respondent that he might have a problem and should consider withdrawing voluntarily. Respondent, however, disregarded this advice and continued to represent the husband in the divorce.

On March 17, 1983, the District Court heard the wife's motion to compel respondent to withdraw. Following testimony from both parties and argument from both counsel, the Court found that respondent had violated the Maine Bar Rules provisions on conflict of interest, multiple employment, protection of the interest of a former client, preserving confidences and secrets of a client, and avoiding misreliance on a lawyer's opinion by someone other than a client. *See* M. Bar R. 3.4(b), (c) and (e); 3.6(l) (1) and (m). The Court, therefore, ordered defendant to cease all involvement with either party concerning the pending divorce action.

In June 1983, Bar Counsel filed a petition with the Grievance Commission of the Bar, pursuant to M. Bar R. 7(e) (2), charging respondent with misconduct. Respondent represented himself before the Commission, and the Board of Overseers was represented by Bar Counsel. The Commission concluded that respondent failed to adequately disclose to the husband and wife his relationship with them and that respondent should not have represented the husband in the divorce proceeding in light of respondent's prior professional activities on behalf of the wife. The Commission recommended that an infor-

mation be filed with the Supreme Judicial Court, and that if the Court found that respondent violated the Maine Bar Rules, respondent be suspended from the practice of law.

II.

Respondent's course of conduct constitutes violations of the Maine Bar Rules in three broad areas: acceptance of employment, conduct during employment, and withdrawal from employment. The facts are clear that respondent undertook to represent both parties in their divorce action. Even though respondent advised the parties that he could not represent both of them in a contested divorce and that the wife had the right to seek her own lawyer, he did in fact give legal advice to both parties and the wife considered respondent to be her lawyer. Indeed, her conclusion was reasonable given that respondent represented her on the OUI charge contemporaneously with his involvement in the early portion of the divorce process. A client includes a person who is either "rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him." *See* M.R. Evid. 502(a) (1). Clearly, respondent and the wife had established a lawyer-client relationship with regard to the divorce proceeding within the meaning of the Maine Bar Rules.[2]

[2]Even if this Court were to conclude that respondent did not undertake representation of the wife in connection with the divorce, he would have violated Rule 3.4(e) when he accepted employment from the husband. Rule 3.4(e) provides that a "lawyer shall not accept employment adverse to a former client without that client's informed written consent if such new employment involves the subject matter of the former employment or may involve the use of confidential information obtained through such former employment." Respondent improperly failed to obtain the wife's written consent to his representation of the husband in the divorce action. Her written consent was needed because respondent represented her in a civil OUI action, and use of confidential information obtained through such representation was foreseeable in the divorce action.

Further, assuming that respondent is correct that the wife was not his client in the divorce proceeding, his conduct violated Rule 3.6(m), Avoiding Misreliance. Because the wife was in the room with her husband and respondent discussing the terms of the divorce agreement, respondent knew that his advice and opinions were being communicated to her, including his opinion on her share of the marital property. Because he failed to take reasonable steps to prevent her from believing that he represented her interests, respondent violated Rule 3.6(m).

III.

Rule 3.4 addresses acceptance of employment. Before accepting employment, a lawyer is required to disclose to his prospective client certain interests, including: "his relationship, if any, with an adverse party;. . .all the circumstances regarding his relationship to the parties; and any interest or connection with the matter at hand that a lawyer knows or reasonably should know would influence the client in the selection of a lawyer."

M. Bar R. 3.4(a).

Respondent failed to adequately disclose the precise nature of his relationship with the husband, a party adverse to the wife. Similarly, respondent failed to adequately disclose all the circumstances regarding his relationship to the parties, i.e., that in the event of disagreement he would be acting with the intent of furthering the husband's interests at the expense of the wife's interests, if necessary. In addition, respondent failed to adequately disclose information that he should have known would influence the wife in the selection of a lawyer. Accordingly, respondent violated the strictures of Rule 3.4(a).

By agreeing to undertake the representation of both parties, respondent also violated Rule 3.4(b), Conflict of Interest. Respondent's judgment was likely to be "adversely affected by the acceptance of such employment" and was "likely to involve him in representing differing interests. . ." *See* M. Bar R. 3.4(b). Rule 3.4(d) permits a

lawyer to represent multiple clients "if it is obvious that he can adequately represent the interests of each and if each consents. . .after full disclosure. . ." In this case it was not obvious that respondent could adequately represent each client. In addition, respondent failed to make full disclosure of the effect on his judgment of his multiple representation.

Continuation of multiple employment is forbidden by the Rules if the lawyer's exercise "of his independent professional judgment in behalf of a client will be, or is likely to be, adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests," unless permitted by Rule 3.4(d). *See* M. Bar R. 3.4(c). Respondent's multiple employment continued until December 1983 when the wife informed the respondent that she wanted to employ other counsel.

IV.

Respondent's conduct during employment constitutes a violation of Rule 3.6(l) (1) which provides in part:

> (A) lawyer shall not, without the informed written consent of the client, knowingly reveal a confidence or secret of his client; use such a confidence or secret to the disadvantage of his client; or use such confidence or secret to the advantage of himself or a third person.

Without obtaining the informed consent of the wife, respondent used information he received from her. After learning from her that she was in an alcohol rehabilitation program and planned to seek independent legal advice on the divorce, respondent amended the husband's divorce complaint to charge her with "gross and confirmed habits of intoxication from the use of liquor." Thus respondent used a secret of his client to his client's disadvantage and to the advantage of a third person. Her whereabouts were protected as a secret because the in-

formation was gained by respondent in his professional relationship with her and disclosure of the information "would be embarrassing or detrimental" to her. *See* M. Bar R. 3.6(l) (5).

V.

Under Rule 3.5 (b) (2) (ii), a lawyer shall withdraw from representing a client if he "knows or should know, that his continued employment will result in violation of these Rules." Respondent failed to withdraw voluntarily from representing the husband after improperly using the wife's secrets and after receiving knowledge that she sought severance of respondent's connection with the divorce proceeding. Respondent's failure to withdraw is particularly egregious in view of the advice he received in January 1984 from the judge hearing the husband's ex parte motion for temporary custody. The motion judge stated that respondent ought to consider withdrawing his representation in the divorce proceedings.

VI.

In determining the appropriate sanction for the violations found in the case, the Court must consider that respondent was suspended from practice for four months for similar conduct in 1977. The incidents giving rise to his prior suspension involved violations more patent than those presented in this case. Nevertheless, respondent's continued insensitivity to the obligations of an attorney is made more egregious by the fact that he persisted in his representation of the husband, even after receiving a warning from a member of the court.

THE ORDER OF SANCTION

Respondent, James M. Dineen is hereby suspended as an attorney and counsellor at law from the practice of law in all Courts of this State for a period of six months, said period of suspension to commence 30 days from the date of the entry of this ORDER under the provisions of M. Bar R. 7(n).

Dated at Augusta, Maine, this eighteenth day of January, 1985.

Justice, Supreme Judicial Court

STATE OF MAINE
BEFORE THE
SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT
LAW DOCKET NO. YOR-85-56

BOARD OF OVERSEERS OF THE BAR, PLAINTIFF
v.
JAMES M. DINEEN, DEFENDANT

NOTICE OF APPEAL

Now comes the Respondent-Appellant in the above entitled matter, James M. Dineen, Pro Se, and, pursuant to 28 U.S.C. § 1257 et seq., 28 U.S.C. § 2101 et seq., U.S. Supreme Court Rules 10, 11, and 28, and Order of this Law Court of Decembr 4, 1985, gives notice that he appeals to the Supreme Court of the United States the Judgment and Order of the Supreme Judicial Court of Maine in the within matter dated November 4, 1985.

Dated at Kittery, Maine, this twentieth day of December, 1985.

James M. Dineen
Respondent-Appellant Pro Se
P.O. Box 324
Kittery, Maine 03904

STATE OF MAINE
YORK, ss.

I, James M. Dineen, being first duly sworn on oath, depose and state that I have on this twentieth day of December, 1985, served conformed copies of the foregoing Notice of Appeal upon all appropriate parties by placing conformed copies of same in a United States Mail box at Portsmouth, New Hampshire First Class postage prepaid, addressed to J. Scott Davis, Esq., Attorney for Board of Overseers of the Bar, P.O. Box 1820, Augusta, Maine 04330. I also state that I have caused similar notice to be given directly to the United States Supreme Court, addressed to Office of the Clerk, Supreme Court of the United States, Washington, D.C. 20543.

JAMES M. DINEEN
Respondent-Appellant Pro Se

STATE OF MAINE
YORK, ss.

On this twentieth day of December, 1985, then personally appeared before me the above named James M. Dineen and made oath that he has read the foregoing, knows the contents therein and that the same are true as stated.

Notary Public

My commission expires:

STATE OF MAINE
BEFORE THE
SUPREME JUDICIAL COURT

DOCKET NO. BAR-84-1

BOARD OF OVERSEERS OF THE BAR
v.
JAMES M. DINEEN

ANSWER TO AMENDMENT TO COMPLAINT

Now comes the Respondent herein and denies the allegations set forth in Paragraph No. 13(a) of the Plaintiff's Amended Complaint.

Dated: December 7, 1984.

Attorney for Respondent

I, James M. Dineen, Respondent, hereby certify that I have delivered in hand a copy of the foregoing Answer to Amendment to Complaint to Bar Counsel, J. Scott Davis, Esq.

James M. Dineen

STATE OF MAINE
BEFORE THE
SUPREME JUDICIAL COURT

DOCKET NO. BAR-84-1

BOARD OF OVERSEERS OF THE BAR
v.
JAMES MARTIN DINEEN

MOTION TO SUPPLEMENT
PLAINTIFF'S INFORMATION

NOW COMES, J. Scott Davis, Bar Counsel for the Board of Overseers of the Bar, Plaintiff, and requests Plaintiff's Information be supplemented by adding the following language thereto:

> 13a. By amending the Complaint for Divorce to include an additional count concerning Mrs. Ganem's alcohol-related problems, and therein continuing to represent Mr. Ganem, the Defendant has violated the provisions of M. Bar R. 3.4(e) and 3.5(b) (2) (ii) which read, respectively, as follows:
>
> 3.4 *Acceptance of employment.* (e) *Interest of Former Client.* A lawyer shall not accept employment adverse to a former client without that client's informed written consent if such new employment involves the subject matter of the former employment or may involve the use of confidential information obtained through such former employment.
>
> 3.5 *Withdrawl from Employment.* (b) *Mandatory*

Withdrawal. (2) A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer reprsenting a client in other matters shall withdraw from employment if: (ii) He knows, or should know, that his continued employment will result in violation of these Rules.

Dated: June 28, 1984

J. Scott Davis, Bar Counsel
Board of Overseers of the Bar

ORDER

The above Motion to Supplement is (granted) (denied) and the above language in paragraph 13a is hereby ordered added to the Plaintiff's Information.

Dated:

Daniel E. Wathen
Associate Justice
Maine Supreme Judicial Court

STATE OF MAINE
BEFORE THE
SUPREME JUDICIAL COURT

DOCKET NO. ——

BOARD OF OVERSEERS OF THE BAR
v.
JAMES MARTIN DINEEN

ANSWER

Comes now the Respondent and makes answer to the Information in the within matter as follows:

FIRST DEFENSE

That the Information fails to set forth a claim upon which relief can be granted.

GENERAL ANSWER

1. That the Respondent admits the allegations set forth in Paragraph 1.

2. That the Respondent denies the allegations set forth in Paragraph 2.

3. That as to Paragraph No. 3, the Respondent denies the allegations set forth in the first sentence; admits that he had previously represented Mr. Ganem, but denies that he had previously represented Mrs. Ganem; and he admits the allegations set forth in the last sentence of Paragraph No. 3.

4. That the Respondent denies the allegations set forth in Paragraph 4.

5. That the Respondent denies the allegations set forth in Paragraph 5.

6. That the Respondent admits the allegations set forth in Paragraph 6.

7. That the Respondent denies the allegations set forth in Paragraph No. 7, except that he does admit that at a point some time after the initiation of the divorce proceeding, his office staff prepared a paper embodying terms directed by Mr. Ganem and that upon completion, the paper was given to Mr. Ganem.

8. That as to the allegations set forth in Paragraph No. 8, the Respondent admits the allegations set forth in the first sentence of said paragraph. That as to the second sentence of said Paragraph, the Respondent admits that the hearing was continued indefinitely after Mrs. Ganem explained her desire for separate representation, but not because of any alleged dissatisfaction of Mrs. Ganem with the settlement agreement, because she mentioned no such dissatisfaction to the Respondent.

9. That the Respondent admits the allegations set forth in Paragraph 9.

10. That as to Paragraph No. 10, the Respondent admits that the Court ordered the Respondent that he should withdraw immediately as attorney for Charles F. Ganem. For further answer, any order by the particular Judge in the within case, Roland A. Cole, against the Respondent should not necessarily be looked upon as the essence of objectivity. The said Judge Cole had acted so prejudicially in times prior to the Ganem matter that the Respondent had been forced to request that the said Judge Cole not sit on any matters in which the Respondent was involved personally and not as counsel for party. The referenced Motion to Compel the Respondent's withdrawal was directed towards the Respondent personally, and the said Judge Cole should not have sat on that particular motion, with or with-

out a specific request from the Respondent that he recuse himself in that matter. Prior to the Ganem matter Judge Cole had stated on the record that he would recuse himself from any future matters in which the Respondent was involved personally and not as counsel for a party.

11. That the Respondent denies the allegations set forth in Paragraph No. 11.

12. That the Respondent denies the allegations set forth in Paragraph No. 12.

13. That the Respondent denies the allegations set forth in Paragraph No. 13.

14. That as to the allegations set forth in Paragraph No. 14 of the Information, they are true. However, the Respondent disagrees with the conclusion of the Grievance Commission that the Respondent should be suspended from the practice of law; the Respondent affirmatively alleges that no such suspension should be imposed. For further answer, the Respondent alleges that from the information available in the Report of the Grievance Commission, it appears that the said Grievance Commission did not sufficiently investigate the circumstances surrounding the previous suspension of the Respondent in the Order of February 27, 1976. Specifically, the alleged conflict that was found as part of the Order of February 27, 1976 differed significantly in character and in circumstances from the alleged conflict of interest which has been raised in the instant matter.

WHEREFORE, the Respondent prays that the Information in the within matter be dismissed and that he be discharged.

Dated: January 13, 1984.

James Martin Dineen
P.O. Box 324
Kittery, Maine 03904

STATE OF MAINE
BEFORE THE
SUPREME JUDICIAL COURT

DOCKET NO. _____

BOARD OF OVERSEERS OF THE BAR
v.
JAMES MARTIN DINEEN

INFORMATION

The Board of Overseers of the Bar, acting through Bar Counsel, charges that:

1. At all times relevant hereto, James Martin Dineen of Kittery, County of York, State of Maine, was an attorney and counselor at law duly admitted to practice in this Court and in other courts of this State.

2. The Defendant is an attorney subject to the Maine Bar Rules and has conducted himself in a manner unworthy of an attorney admitted to the Bar of this State for the reasons specified herein.

3. Near the end of August, 1982 Mary Judith Ganem and Charles F. Ganem engaged the Defendant for the purpose of obtaining a divorce. The Defendant had previously represented both Mr. and Mrs. Ganem in unrelated matters. The Defendant had represented Mrs. Ganem from July through September of 1982 against a charge of operating a motor vehicle while under the influence of intoxicating liquor.

4. When the Defendant met with Mr. and Mrs. Ganem he advised them that should any contest develop over a proposed settlement agreement, they should each obtain their

own attorney. Mrs. Ganem informed the Defendant that she was opposed to the divorce, however, she was willing to discuss the property settlement. Mrs. Ganem expressed her dissatisfaction with the agreement proposed by her husband prior to the marriage, although he did not advise her that she had a right to an increase in the value of his property during the period of their marriage.

5. The Defendant further advised Mrs. Ganem that she should be receiving child suport payments of $50 per week per child.

6. On September 30, 1982 the Respondent made arrangements to have Mrs. Ganem served with divorce papers on the grounds of irreconcilable differences.

7. On October 27, 1982 Mrs. Ganem enrolled in an alcoholic rehabilitation program at Seton Unit, Mid-Maine Medical Center in Waterville, Maine. While Mrs. Ganem was hospitalized, her husband presented her with an agreement drafted by the Defendant which differed in the following respects from the prior discussion Mrs. Ganem had with the Defendant:

a) A clause requiring that Mr. Ganem would have the children for IRS deductions.

b) The child support was noted at $30 per week for each child rather than $50.

8. The divorce hearing was initially scheduled as an uncontested matter for December 23, 1982. The hearing was cancelled after Mrs. Ganem explained to the Defendant her dissatisfaction with the settlement agreement and her desire for separate representation.

9. On January 27, 1983 the Defendant prepared and forwarded to the Court an Amendment to the Complaint for Divorce which alleged that Mrs. Ganem had been guilty of cruel and abusive treatment and that she had been guilty of gross and confirmed habits of intoxication from the use of liquor.

10. On March 17, 1983 in response to a Motion by Mrs. Ganem to "Compel the Counsel for the Plaintiff to Withdraw", the Court determined that in order for a fair and impartial hearing in the divorce, the Defendant should withdraw immediately as attorney for Charles F. Ganem. A copy of the Court's Order is attached hereto as Exhibit "A" and made a part hereof.

11. By undertaking to represent both Mr. and Mrs. Ganem in a divorce action when the Defendant knew or should have known that such a representation presented an inherent conflict of interest, the Defendant has violated the provisions of M. Bar R. 3.4(b) which reads as follows:

> 3.4 *Acceptance of Employment.* (b) *Conflict of Interest.* A lawyer shall not accept employment if the exercise of his independent professional judgment in behalf of a client will be, or is likely to be, adversely affected by the acceptance of such employment, or if it would be likely to involve him in representing differing interest, except to the extent such employment is permitted by subdivision (d) of this rule.

12. By failing to adequately advise Mrs. Ganem as to her rights and responsibilities under applicable divorce law, and by failing to disclose conflicts inherent in representing both parties to a divorce, the Defendant has violated the provisions of M. Bar R. 3.4(a) which reads as follows:

> 3.4 *Acceptance of Employment.* (a) *Disclosure of Interest.* Before accepting any professional employment a lawyer shall disclose to the prospective client his relationship, if any, with the adverse party; his interest, if any, in the subject matter of th employment; all the circumstances regarding his relationship to the parties; and any interest or connection with the matter at hand that a lawyer knows or reasonably should know would influence the client in the selection of a lawyer.

13. By attempting to take advantage of Mrs. Ganem while she was hospitalized for alcoholism and by adding her alcoholism as an additional count amended to the initial Divorce Complaint, the Defendant has violated the provisions of M. Bar R. 3.6(l) (1) which reads as follows:

> 3.6 *Conduct During Representation.* (1) *Preserving Confidences and Secrets.* (1) Except as permitted by these rules or as required by law or order of the court, a lawyer shall not without the informed written consent of the client, knowingly reveal a confidence or secret of his client; use such confidence or secret to the advantage of himself or a third person.

14. The Grievance Commission, at its formal disciplinary hearing on October 27, 1983 determined that there was probable cause for filing an information in the Supreme Judicial Court under M. Bar R. 7(e) (6) with respect to the above. The Commission further determined that this matter should be concluded by a suspension and has reported the same to the Board of Overseers of the Bar, and has caused to be filed with the Executive Clerk of this Court this information. A copy of the Report of Proceeding of the Grievance Commission is affixed hereto as Exhibit "B" and made a part hereof.

WHEREFORE, Plaintiff prays that this Court find that the Defendant has conducted himself in a manner unworthy of an attorney and that this Court impose a suspension.

Dated: December 16, 1983

Michael E. Barr, Bar Counsel
Board of Overseers of the Bar
Whitten Road, P.O. Box 1820
Augusta, ME 04330

JAMES MARTIN DINEEN
ATTORNEY AND COUNSELOR AT LAW
P.O. BOX 324
KITTERY, MAINE 03904

THREE WALKER STREET

207-439-3100

April 4, 1983

Michael E. Barr, Esq.
Board of Overseers of the Bar
P.O. Box 1820
Augusta, Maine 04330

Re: Your File No. 83-41

Dear Mr. Barr:

I am in receipt of your letter in the above entitled matter, as well as the enclosed copy of the Order of Judge Cole.

While I do not wish to appear glib, it appears to me that in several instances, Judge Cole's Order sets forth facts and circumstances which go more to show that there was no violation of the rules, rather than a violation or violations.

There are perhaps a few errors in findings of fact on the part of Judge Cole, probably due to the fact that I was not able to testify or otherwise give my side of the story at the hearing before him.

To summarize the matter, I have acted as counsel for Charles F. Ganem in a continuing variety of matters since he first sought my representation in the mid-1970's. Early in the summer of 1982, Mr. Ganem advised me in a casual way, when he was in my office on other business, that he and his wife "were not getting along." He also advised whether both parties would need attorneys in a divorce action if all aspects of divorce-related matters, such as custody, child support, division of marital property, etc. were

uncontested and not in dispute. I advised Mr. Ganem at that time that an attorney can represent ony one party in a divorce action, but that it appeared to me, in my opinion, that if all aspects of the divorce were uncontested, an agreement could be signed to that effect by both parties and one attorney could represent one of the parties and go to court for purposes of seeking an essentially uncontested divorce. Other than relating the fact that he and his wife "were not getting along" and requesting information on the necessity of two lawyers, Mr. Ganem did not go into detail regarding any specific problems existing between Mary J. Ganem and him. Prior to this time, my only contact, whatsoever, with Mary J. Ganem had been over the telephone when she either took messages for her husband or gave messages to me on his behalf. There has been an allegation by Mrs. Ganem that I represented her in an insurance claim regarding damage to her automobile on an occasion a few years ago. While I remember the occasion, the extent of representation of Mrs. Ganem was not nearly as great as she has testified. My recollection of the facts is that her husband, Charles Ganem, spoke to me about a problem that his wife Mary Judith was having collecting on a claim that she had made against another individual's insurance company for personal property damages arising out of a collision involving a car she was driving. Outside of giving advice to Mr. Ganem as to various directions in which to proceed, I do not believe that I ever took any action on behalf of Mrs. Ganem in that matter, and it is my further belief that the problem was resolved finally without any intercession on my behalf.

Late in July or early in August of 1982, I was again approached by Mr. Ganem, who asked me to represent his wife, Mary Judith, and defend her on a charge of OUI-Civil for which she had recently been charged. I stated that I would be happy to represent her on that charge. In preparation for trial on that offense, I believe that I met with Mrs. Ganem on two occasions. Other than to inquire as to her activities for the entire day on which she was arrested for

the charge (she was arrested at approximately 9:00 o'clock p.m.), I did not ask for, nor did Mrs. Ganem volunteer, any other information regarding any possible or potential alcohol problem or excessive use or abuse of alcohol. In fact, Mrs. Ganem was quite affirmative in stating to me that she had had only a few glasses of wine prior to being stopped, that she had worked at her regular job for the entire day, had gone to a women's exercise class after work and had then gone to a lounge in Portsmouth, New Hampshire to meet a friend and exchange something with him prior to heading home to York. During the meeting with the friend, she consumed a few glasses of wine. I took her words at face value, and I did not feel that the amount of wine which she had consumed would be sufficient to put her "under the influence." I built my defense upon that premise and it was upon that theory that I defended Mrs. Ganem at her trial in September of 1982.

At some point, probably shortly after representing Mrs. Ganem on the OUI offense, Mr. Ganem asked if he could come in Mrs. Ganem's company to my office for purposes of their reporting to me various provisions of their complete and uncontested agreement with regard to a divorce action which was to be initiated. Prior to that meeting, I advised Mr. Ganem most emphatically that if there were even a scintilla of unresolved issue remaining between him and Mrs. Ganem, I should not and could not meet with them on that occasion. He assured me that all issues had been resolved by and between them separately and that the purpose of their coming to my office would simply be for the ministerial setting down of the various terms and conditions. When Mr. Ganem did bring Mrs. Ganem to my office shortly thereafter, I again advised both of them, but especially directed my remarks to Mrs. Ganem that if there was even the slightest doubt or unresolved issue in her mind, I would not even entertain the two of them in my office at that time. I further advised her that if she had any lingering doubts, or even if she had no doubts at all, she was

entitled to seek counsel of her choice. This advice or warning was given to Mrs. Ganem on at least three ocassions during the time that she and Mr. Ganem were in my office on that occasion. On each occasion of my warning and advice, Mrs. Ganem repeated that she understood and that all issues had been resolved between her and her husband. I do not recall being asked for any legal advice by Mrs. Ganem on that occasion, nor do I recall giving any. In fact, I am quite sure that I did not give any such advice.

After Mrs. Ganem left my office in the company of her husband that day, I never saw her again until she appeared in court in Kittery with her present attorney on March 17, 1983.

To spare Mrs. Ganem inconvenience and/or embarrasment, and after questioning her accordingly, it was agreed that papers instituting a divorce on behalf of Mr. Ganem would be served on her in my office on September 30, 1982. Contrary to the matter alleged by Judge Cole at the bottom of the first page of his Order, I never indicated that I could make either party Plaintiff and appear as attorney for that Plaintiff in an uncontested divorce. My feeling and intention throughout was that I was in this matter Charles Ganem's attorney, and that if I appeared as counsel for any party in a divorce action between the two of them, it would be as counsel for Charles Ganem or not at all.

Several weeks, or perhaps even a few months later, Mr. Ganem contacted me, and asked me to have ready for him a typed agreement containing the terms for an uncontested divorce which he and Mrs. Ganem had already agreed upon. That proposal was prepared and Mr. Ganem took it to his wife for her signature. Mr. Ganem brought the agreement back at some later time. It was signed by Mrs. Ganem. At that point, a date for an uncontested divorce was obtained, December 23, 1982. On or about December 21 or December 22, 1982, not having seen or talked to Mrs. Ganem since September 30, 1982, my office received a tele-

phone call from her during my absence. She asked that I return her call, and I did. In that conversation, Mrs. Ganem stated that she needed some more time to reflect upon matters involving the divorce and could the matter be continued. I readily advised her that I would immediately notify the court that the matter would be continued, and I again advised her that she had the absolute right to contact an attorney of her own choice for counsel in this matter. We discussed a few pleasantries, but we did not in any way discuss any other matters which would have a bearing upon the divorce action that was then pending between Mr. and Mrs. Ganem. As a result of that telephone conversation, I did in fact notify the District Court in Kittery that the Ganem matter would not be going forward to hearing on the 23rd and that it should be continued generally without being reassigned to any particular date.

Thereafter in January of 1983 an appearance was received on behalf of Mrs. Ganem by an attorney in Bangor, Maine. At that time or subsequent thereto, there was also a Motion filed by that attorney seeking to allow the late filing of a Counterclaim for Divorce, in which the alleged grounds were irreconcilable differences *and* cruel and abusive treatment. When these papers were received, I advised Mr. Ganem of same, and also discussed with him the content of the grounds for divorce being sought in the Counterclaim. At that point, Mr. Ganem asked what were the possible different grounds upon which he could seek a divorce on cruel and abusive treatment, and he felt that she was listing those grounds in a purely vindictive way and that there was no merit to those grounds at all. I read from the appropriate Maine statute to Mr. Ganem all of the possible grounds upon which a divorce could be obtained. As a result of my explanation of those grounds to Mr. Ganem, he requested that I amend his grounds for seeking a divorce to include the grounds of cruel and abusive treatment and gross and confirmed habits of intoxication from the use of liquor. The decision to incorporate the "gross

and confirmed habits of intoxication from the use of liquor" was Mr. Ganem's choice and his alone. The decision to include those grounds in an amended divorce complaint was not my choice and clearly was not in any way influenced because of my having represented Mrs. Ganem on the particular OUI charge in September of 1982. During this particular meeting, Mr. Ganem explained for the first time of an alleged alcohol abuse problem which Mrs. Ganem had.

As a result of Judge Cole's Order, I filed the appropriate withdrawal of appearance. Under all of the attendant circumstances, I do not believe that there was any impropriety in my remaining on as counsel for Mr. Ganem after the matter became a contested one between him and his wife. I had not gained any confidentialities or any undue advantage over Mrs. Ganem either as a result of her having come into the office to record her agreement to the proposal of the intended divorce judgment or as a result of having defended her on the particular OUI charge. Clearly, whether my position is correct or incorrect, the fact that I believed that I was continuing to act in a proper way should be borne out by the fact that I remained on as counsel for Mr. Ganem to defend the motion of Mrs. Ganem's new attorney seeking to force my withdrawal as Mr. Ganem's attorney. It seems to me that if there had ben any thought of impropriety in my mind, I would have taken the easier course of withdrawing immediately, rather than remaining on to defend my position as I did.

I should also like to point out to you that the particular factual situation that occurred in this case, wherein one attorney represents one party to an uncontested divorce action and the other party simply had no counsel, is a very common practice in the practice of law in York County. I have always assiduously shied away from any situation in which my conduct or participation would have even the appearance of a conflict of interest. In the instant matter, my involvement with Mary Judith Ganem was so limited

as to be able to continue to keep me free of even the appearance of conflict of interest in this matter.

Mr. Ganem has advised me that in recent weeks and months, Mrs. Ganem has become very vindictive to him and has stated to him in very certain terms that she is going to do anything she can to hurt him in this action. I construe her and her attorney's successful crusade to force me to withdraw as Mr. Ganem's attorney in this matter as being motivated more and perhaps even exclusively by Mr. Ganem's expressed sentiments towards her husband, rather than out of any true feeling or assertion of conflict of interest on my part. I suggest that you contact Mr. Ganem directly for his verification on this particular point.

If I can be of further assistance, please do not hesitate to contact me.

Very truly yours,

James M. Dineen

JMD/ds

P.S. Mr. Ganem, for your information, can be found at the York Machine Shop, Route No. 1, Cape Neddick (York), Maine. His telephone number is 363-6560.

JMD

STATE OF MAINE
DISTRICT COURT
SOUTHERN YORK DIVISION
KITTERY, MAINE 03904

ROLAND A. COLE
RESIDENT JUDGE

March 17, 1983

Michael Barr, Esq.
Maine State Bar
P.O. Box 1820
Augusta, Maine 04330

Dear Mr. Barr:

On this date I heard a motion to have an attorney removed from a case on the basis of violation of the Maine Bar Rules.

After hearing the matter I agreed that there was a violation of several of the rules, and to insure that a fair hearing could be had by all parties I ordered that attorney to withdraw from further representation of any of the parties in that case. I enclose a copy of my order for your attention, although I understand that my rulings for the purpose of insuring a fair trial clearly are not binding upon you.

If you deem it necessary to contact me for any further information, I am available.

Yours truly,

Roland A. Cole

RAC/pb
cc James Martin Dineen, Esq.

STATE OF MAINE
BEFORE THE
DISTRICT COURT
DISTRICT TEN
DIVISION OF SOUTHERN YORK

DOCKET NO. 82—DV-155

CHARLES FRANCIS GANEM, Plaintiff
v.
MARY JUDITH GANEM, Defendant

ORDER RE: DEFENDANT'S MOTION TO COMPEL THE COUNSEL FOR THE PLAINTIFF TO WITHDRAW

The Court heard testimony of the Plaintiff and Defendant concerning their respective association with attorney James Martin Dineen.

The Court finds that James Martin Dineen, Esq. acted as attorney for Charles F. Ganem on a regular basis since the mid 1970's. James Martin Dineen, Esq. also represented Mary Judith Ganem on an insurance problem prior to her marriage to Charles Francis Ganem.

In the Spring of 1982, Charles F. Ganem and Mary J. Ganem discussed the possibility of a divorce, and in the early summer of 1982 Charles F. Ganem consulted with James Martin Dineen, Esq. concerning the potential divorce and if James Martin Dineen could handle the matter.

On July 21, 1982 a civil complaint for a violation of Title 29 M.R.S.A. 1312-C (civil O.U.I.) was brought against Mary Judith Ganem and James Martin Dineen, Esq. entered his

appearance for her on August 9, 1982. A trial was held on September 20, 1982, at which time James Martin Dineen vigorously represented his client, Mary Judith Ganem. In preparation for the trial, the attorney received information that his client had consumed a small amount of wine and she denied the allegations of impairment because of excessive consumption of alcohol.

At about the same time, the Plaintiff and Defendant met in attorney James martin Dineen's office and presented to attorney Dineen a bare bones proposed settlement agreement for their divorce. It is agreed that at this meeting attorney Dineen advised Mary Judith Ganem that if there was any contest that she should consult her own attorney. She claims that she received misleading advice as to what was marital property and also that she was told that her husband would pay more than the money amounts as set forth in the agreement for support of the minor children Attorney Dineen indicated that if the matter was to continue uncontested then he could make either party Plaintiff and appear as attorney for that Plaintiff.

On September 30, 1983, attorney Dineen made arrangements for Mary Judith Ganem to be served divorce papers in his office. The grounds alleged were "Irreconcilable marital differences."

Mrs. Ganem committed herself into an alcoholic rehabilitation program at Seton Unit in Waterville, Maine in the late fall of 1982. The testimony indicates that her husband presented her with a proposed settlement agreement in December while she was there. This agreement had been drafted by James Martin Dineen, Esq. and incorporated the material tentatively agreed upon in his office by the parties in September, but added a provision not agreed upon concerning Charles F. Ganem having the right to claim the children for I.R.S. purposes. Mrs. Ganem signed the agreement.

The divorce was scheduled for uncontested hearing on December 23, 1982 but was canceled after Mrs. Ganem explained to James Martin Dineen, Esq. about her treatment and dissatisfaction with the agreement and that she wanted representation.

On January 27, 1983 attorney James Martin Dineen prepared and forwarded to the Court an "Amendment to Complaint for Divorce" after discovering that Mary Judith Ganem had an attorney, Elizabeth Kelly Ebitz, and after discussing generally the facts and that the settlement agreement was being challenged and the divorce might be contested by Mrs. Ganem. This proposed amendment alleges further grounds for divorce as follows:

> "1. That Paragraph No. 11 is amended to read as follows:
>
> That there have arisen between the parties certain irreconcilable differences which have caused the irremediable breakdown of the marriage; that the Defendant has been guilty of Cruel and Abusive Treatment; that the Defendant has been guilty of gross and confirmed habits of intoxication from the use of liquor."

The Court finds that it is necessary to allow all parties the opportunity for a fair and impartial hearing in this matter and, therefore, attorney James Martin Dineen shall withdraw immediately as attorney for Charles Francis Ganem.

The Court finds that the above involvement of attorney James Martin Dineen is a violation of Maine Bar Rules 3.4 (b) (c) and (e); 3.6 (l) (1) and (m).

Therefore, the Court hereby orders attorney James Martin Dineen, Esq. to cease all involvement with either Mary Judith Ganem or Charles Francis Ganem concerning the pending domestic relations controversy in this Court under Maine Bar Rules 3.5 (b) (2) (ii). In so doing, this Court

is not attempting to penalize or impose any sanctions against the attorney as such action is clearly reserved to the Supreme Judicial Court of Maine.

Dated at Kittery, Maine this 17th day of March 1983.

ROLAND A. COLE, JUDGE,
MAINE DISTRICT COURT

FILED
APR 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1640 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAMES M. DINEEN,
PETITIONER,

v.

MAINE BOARD OF OVERSEERS OF THE BAR,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MAINE

BRIEF IN OPPOSITION FOR THE RESPONDENT

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In the
Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1640

JAMES M. DINEEN,
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MAINE BOARD OF OVERSEERS OF THE BAR,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MAINE

BRIEF IN OPPOSITION FOR THE RESPONDENT

Statement of the Case

The Respondent incorporates by reference, Section I of the Maine Supreme Judicial Court's decision in the matter of *Board of Overseers of the Bar* v. *James M. Dineen*, at App. pp. 1a—5a of the petition, as the appropriate Statement of the Case in this matter.

Reasons For Denying the Writ

I. THE PETITIONER WAS NOT DENIED DUE PROCESS OF LAW WHEN THE STATE DISTRICT COURT JUDGE HEARD AND RULED UPON A MOTION TO COMPEL THE PETITIONER TO WITHDRAW.

The Petitioner contends that District Court Judge Roland A. Cole's hearing and ruling upon a motion for Petitioner's withdrawal, constituted a violation of the Petitioner's due process of law. This is simply not the case.

At no time did the Petitioner request that Judge Cole recuse himself from hearing or deciding the motion for Petitioner's withdrawal. Indeed, the Petitioner gave no testimony at the disciplinary hearing before the single justice, relating to his present claim of improper conduct by Judge Cole. The Petitioner made an indirect reference to the prior personal history between Judge Cole and himself, in the context of his Answer to the Information. However, even that Answer only refers to the Petitioner's request for Judge Cole not to be involved in matters in which the Petitioner appeared personally. The Petitioner's handling of the *Ganem* matter including the motion for his withdrawal, was not a matter involving the Petitioner on a personal basis. Therefore, there would have been no reason for Judge Cole to necessarily recuse himself from the *Ganem* matter, even if requested to do so. In fact, however, he was not requested to recuse himself. Thus, the Petitioner has raised no important question for the Court to consider on this issue, given the fact that he did not raise this issue before Judge Cole, and did not pursue it as an affirmative defense before the single justice. Additionally, this issue was not briefed or presented by the Petitioner upon his appeal to the Maine Law Court. See Appendix A to this brief. Having failed to preserve this issue, he may not now raise it for the first time. *Blanchette* v. *York Mut. Ins. Co.*, 455 A.2d 426, 428 (Me. 1983). *Cyr* v. *Cyr*, 432 A.2d 793, 797 (Me. 1981).

Finally, the Court should note that there was in fact "an impartial, disinterested judge" that did hear this matter, Justice Daniel Wathen. See petition p. 9.

II. NEITHER THE MAINE BAR RULES, NOR THE COURT'S ISSUANCE OF AN ORDER BASED THEREON, VIOLATE ANY PROVISION OF THE CONSTITUTION OF THE UNITED STATES.

Despite the Petitioner's indication that he filed his Petition based upon 28 U.S.C. § 1257(3), it is unclear whether in fact, jurisdiction is is properly based thereon.

That is, although the Petitioner bases the jurisdiction of this Court under Section 1257(3), he has failed to provide any authority or support for his position that the Maine Bar Rules, either as written or administered, in fact constitute a violation of the United States Constitution.

In fact, it is a settled principle, that the authority to define and regulate the practice of law naturally and logically belongs to the judicial department. See *Board of Overseers of the Bar* v. *Lee*, Me., 422 A.2d 990, 1002 (1980).

> "And it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed. The power, however, is not an arbitrary and despotic one to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself." *In Re Secombe*, 60 U.S. (19 Howard) 9, 13 (1856).

The final responsibility in determining discipline to be imposed, rests with the state's highest court, and in determining the appropriate penalty the court may properly consider all facts and circumstances in their decision and litigation thereof. *In Re Neff*, 413 N.E.2d 1282, 1284 (1980).

The Maine Supreme Judicial Court, as part of its inherent powers, has the ultimate and exclusive responsibility for the structure and administration of disciplinary proceedings against lawyers. *People* v. *Susman*, Colo., 587 P.2d 782, 786 (1978); *Board of Overseers of the Bar* v. *Lee*, *supra*.

Thus, it is the inherent authority of the Maine court to promulgate and administer the disciplinary rules and sanctions. Petitioner has failed to present any facts or authority supporting his claim that the Maine court violated his due process of law by imposing a six-month suspension of his right to practice law in the State of Maine. Indeed, at the time of the issuance of Justice Wathen's Order of Suspension, the court was aware of the fact that the Petitioner had previously been suspended for a four-month period for similar conduct. App. p. 19a of the petition.

Finally, the Petitioner failed to make any of these constitutional arguments and claims to either the single justice, or to the Maine Law Court. Thus, they have not been properly preserved for this Court's consideration. *Cyr* v. *Cyr*, *supra*.

Conclusion

The Petition for Writ of Certiorari should be denied.

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APPENDIX A

STATE OF MAINE

SUPREME JUDICIAL COURT

Sitting As The Law Court

YORK, ss. LAW DOCKET No. YOR-85-56

BOARD OF OVERSEERS OF THE BAR,
PETITIONER-APPELLEE,

v.

JAMES MARTIN DINEEN,
RESPONDENT-APPELLANT.

ON APPEAL FROM A DECISION AND ORDER OF
JUSTICE DANIEL E. WATHEN

BRIEF OF RESPONDENT-APPELLANT JAMES MARTIN DINEEN

JAMES J. FITZPATRICK
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Attorney for Respondent-Appellant

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Kittery, Maine 03904
Respondent-Appellant Pro Se

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Statement of Facts

Attorney James M. Dineen represented Charles F. Ganem in a continuum of matters beginning with Mr. Ganem's divorce from a former wife in 1974, and progressing through representation and advice on several other personal and business matters through the Summer of 1982.

Charles F. Ganem married Mary Judith Ganem in April of 1979. Between that time and the Summer of 1982, Mary Judith Ganem was well aware of the continuing professional relationship existing between her husband and James M. Dineen.

In the Summer of 1982, Charles F. Ganem arranged for James M. Dineen to represent Mary Judith Ganem on a civil O.U.I. charge which had been brought against her in the District Court in Kittery, Maine.

Attorney Dineen's preparation of Mrs. Ganem's defense on that charge included an interview with Mrs. Ganem in which Attorney Dineen inquired of Mrs. Ganem's activities only on the day of the arrest and as to how much if any alcohol she had consumed that day. Attorney Dineen did not inquire about, nor did Mrs. Ganem volunteer, any information about any past history concerning the use or abuse of alcohol. That matter went to trial in September of 1982, and Mrs. Ganem was adjudged to have committed the violation of civil O.U.I.

In the late summer or early autumn of 1982, Charles F. Ganem approached Attorney Dineen and asked him to represent him in what was then to be an uncontested divorce. Mr. and Mrs. Ganem had worked out all aspects of a property and child custody settlement between themselves, and Mr. Ganem, in Mrs. Ganem's company, came into Attorney Dineen's office for the purpose of having Attorney Dineen receive and write down the terms of the negotiated agreement arrived at independently beforehand between Mr. and Mrs. Ganem.

Mrs. Ganem was served with divorce papers. Later, Mr. Ganem took to Mrs. Ganem a typed version of the terms of their agreement. That type-written version had been prepared in Attorney Dineen's office.

After Mrs. Ganem's one appearance in Attorney Dineen's office in the company of her husband, Attorney Dineen did not again see her or hear from Mrs. Ganem until approximately December 22, 1982, at which time Mrs. Ganem advised Attorney Dineen that she was reconsidering the agreement she had signed and that she was considering retaining counsel to represent her in the divorce action. She asked Attorney Dineen if he would postpone or continue the uncontested divorce hearing that had been scheduled for hearing for the following day on Mr. Ganem's behalf. Attorney Dineen agreed and no hearing was had, nor was any rescheduled at that time.

A few weeks later, an attorney entered her appearance on behalf of Mrs. Ganem. Shortly thereafter, Mrs. Ganem's attorney filed a Motion with the Court seeking to compel the withdrawal of James M. Dineen's appearance on behalf of Charles F. Ganem. The reasons advanced by Mrs. Ganem's attorney in support of her Motion were that James M. Dineen was in a conflict of interest and the possession of adverse secret confidential information by James M. Dineen about Mrs. Ganem alleged to have been obtained during James M. Dineen's earlier representation of Mrs. Ganem on the referenced O.U.I. charge. Attorney Dineen denied then, and has continued to deny throughout, any conflict of interest and the gaining of any adverse, confidential information from Mrs. Ganem.

After hearing on the referenced Motion to Compel Withdrawal, Judge Roland Cole of the District Court granted that Motion, and he also filed a letter of complaint on the same subject about James M. Dineen with the Board of Overseers of the Bar. After hearing on Information before Justice Daniel E. Wathen, sitting as a Single Justice, James M. Dineen was ordered suspended from the practice of law for six months.

From that Judgment and Order, James M. Dineen, the Appellant-Respondent herein, has appealed to the Supreme Judicial Court, sitting as the Law Court.

Issues

The Issues presented to the Court for determination are:

I. Whether the Single Justice erred in his finding of violation of Maine Bar Rule 3.6(1) *Conduct During Representation, Preserving Confidences and Secrets*?

II. Whether the Single Justice erred in his finding of violation of Maine Bar Rules 3.4(a) and 3.4(b) *Acceptance of Employment, Disclosure of Interest and Conflict of Interest*?

III. Whether the Single Justice erred in his finding of violation of Maine Bar Rule 3.4(e) *Interest of Former Client*?

IV. Whether the Single Justice erred in his finding of violation of Maine Bar Rule 3.5(b)(2)(ii) *Withdrawal from Employment, Mandatory Withdrawal*?

Argument

I. THE SINGLE JUSTICE ERRED IN HIS FINDING OF VIOLATION OF MAINE BAR RULE 3.6(1) *Conduct During Representation, Preserving Confidences And Secrets.*

Mrs. Ganem was represented by the Respondent with regard to a civil O.U.I. charge and as a part of the preparation thereof, Mrs. Ganem advised the Respondent in fact of no alcoholic history or facts (T. 29, 6-13).

Mrs. Ganem in fact desired that such information as related to her alcoholic condition not be known (T. 77, 25; T. 78, 2-14; T. 29, 1-14).

Attorney Dineen did not receive from Mrs. Ganem any information of the alcoholic situation of Mrs. Ganem (T. 99, 1-4; T. 104, 1-25; T. 105, 1-25).

The Judge hearing the Motion for Disqualification assumed without factual basis that Attorney Dineen had some idea of Mrs. Ganem's alcoholic history (T. 60, 1-25; T. 61, 1-9). There is no evidence to support the assumption that Attorney Dineen was aware of any alcoholic history other than those facts which were given him by Mrs. Ganem at the time of preparation for hearing on a civil O.U.I. complaint. In fact, the history of Mrs. Ganem's Seton Unit visitation was not communicated to Attorney Dineen until January of 1983 (T. 57, 4-24), and such information was communicated to Attorney Dineen after the O.U.I. complaint had been disposed of (T. 78, 2-14).

Attorney Dineen learned only from *Mr.* Ganem of Mrs. Ganem's alcoholic problems and that information was not received for the *first* time by Attorney Dineen until January of 1983, *after* Mrs. Ganem had engaged counsel, who then entered her appearance on behalf of Mrs. Ganem. (T. 83, 3-13; T. 101, 25; T. 102, 1-8).

Accordingly, the finding of a violation of Maine Bar Rule 3.6(1) is not supported by any facts in the record with regard to the breaching of any confidences so as to constitute a disadvantage to Mrs. Ganem.

II. The Single Justice Erred In His Finding Of Violation Of Maine Bar Rules 3.4(a) And 3.4(b) *Acceptance Of Employment, Disclosure Of Interest* And *Conflict Of Interest.*

Mrs. Ganem was aware of the representation of Mr. Dineen on various matters of Mr. Ganem prior to Mr. Dineen's representation of Mrs. Ganem on the charge brought against her for Operating While Under the Influence of Intoxicating Liquor—Civil (T. 27, 14-25).

There is evidence that Mr. and Mrs. Ganem had sought a so-called uncontested divorce and that Attorney Dineen did not participate in the negotiations or discussions which led to the property and custody agreement which was placed in typewritten form by Attorney Dineen's office.

There is no evidence that Mrs. Ganem did at any time rely upon advice of Attorney Dineen in the property-custody settlement which was placed in typewritten form in Attorney Dineen's office. (T. 72, 8-25). In fact, Attorney Dineen advised the parties of his limited representation of Mr. Ganem and only upon the condition of agreement of the parties to the same. (T. 12, 18-25; T. 13, 1-15; T. 35, 1-16).

It is respectfully submitted that Mrs. Ganem was aware of Attorney Dineen's representation of Mr. Ganem and acquiesced in such representation as permitted by Maine Bar Rule 3.4(d), and that Attorney Dineen's representation was such that no indication appeared to warrant a conclusion of representation of differing interests in the representation of Mr. Ganem.

III. The Single Justice Erred In His Finding Of Violation Of Maine Bar Rule 3.4(e) *Interest Of Former Client.*

There is no evidence to warrant a finding that Attorney Dineen knew of any facts that would lead to a violation of Maine Bar Rule 3.4(e).

At the time of hearing before the District Court Judge on the Motion to Compel Withdrawal of the Appearance of James M. Dineen, it become abundantly clear that any information which Attorney Dineen had gained of Mrs. Ganem's possible alcohol problem was acquired in January of 1983, long after the September, 1982 conclusion of proceedings in Mrs. Ganem's O.U.I. matter. Such information of Mrs. Ganem's condition was not communicated to Attorney Dineen (T. 78, 2-14).

There is no factual basis to justify any inference that Attorney Dineen's representation of Mr. Ganem would create a situation in which information of the previous representation of Mrs. Ganem would be related to the divorce action or otherwise result in any breach of confidence as a result thereof.

IV. THE SINGLE JUSTICE ERRED IN HIS FINDING OF VIOLATION OF MAINE BAR RULE 3.5(b)(2)(ii) *Withdrawal From Employment, Mandatory Withdrawal.*

Because, as previously argued, there is no evidence that Attorney Dineen had received any information from Mrs. Ganem through his prior representation of her in the O.U.I. matter which would be in any way related to the divorce proceedings or be grounds therefor, there was nothing that Attorney Dineen knew, or should have known, to indicate that his continued employment would result in a violation of the Maine Bar Rules.

Since nothing in the evidence supports the position that Attorney Dineen gained any adverse, confidential information from Mrs. Ganem in representing her on an O.U.I. matter which he could use or did use against her in the subsequent divorce proceedings, the Court could not reasonably find that Attorney Dineen should have withdrawn as Mr. Ganem's counsel.

In conclusion, the Appellant herein argues that the record fails to show that Attorney Dineen violated any of the Maine Bar Rules as alleged, or any other Maine Bar Rules; therefore, the adverse judgment rendered against him by the Single Justice should be reversed.

Addendum

Maine Bar Rule 3.6(1) *Conduct During Representation, Preserving Confidences and Secrets:*

(1) Except as permitted by these rules or as required by law or order of court, a lawyer shall not, without the informed written consent of the client, knowingly reveal a confidence or secret of his client; use such a confidence or secret to the disadvantage of his client; or use such confidence or secret to the advantage of himself or a third person.

(2) A lawyer shall exercise reasonable care to prevent his partners, employees, associates, and others whose services are utilized by him from improperly disclosing or using confidences or secrets of a client.

(3) This provision is not violated by the disclosure of confidences or secrets by a lawyer as necessary to the defense of himself, his partners, employees, or associates against an accusation of wrongful conduct, in a judiciary proceeding including, but not limited to, any grievance proceeding under these rules.

(4) This provision is not violated by the disclosure of a client's intention to commit a crime or the information necessary to prevent the crime or to avoid subjecting others to risk of harm.

(5) As used in Rule 3.6(1) "confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested by held inviolate or the disclosure of which would be embarrassing or detrimental to the client.

Maine Bar Rule 3.4(a) *Acceptance of Employment, Disclosure of Interest:*

> Before accepting any professional employment a lawyer shall disclose to the prospective client his relationship, if any, with the adverse party; his interest, if any, in the subject matter of the employment; all the circumstances regarding his relationship to the parties; and any interest or connection with the matter at hand that a lawyer knows or reasonably should know would influence the client in the selection of a lawyer.

Maine Bar Rule 3.4(b) *Acceptance of Employment, Conflict of Interest:*

> A lawyer should not accept employment if the exercise of his independent professional judgment in behalf of a client will be, or is likely to be, adversely affected by the acceptance of such employment, or if it would be likely to involve him in representing differing interests, except to the extent such employment is permitted by subdivision (d) of this rule.

Maine Bar Rule 3.4(d) Acceptance of Employment, Multiple Employment Permitted:

> A lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each.

Maine Bar Rule 3.4(e) *Acceptance of Employment, Interest of Former Client:*

> A lawyer shall not accept employment adverse to a former client without that client's informed written consent if such new employment involves the subject matter of former employment or may involve the use of confidential information obtained through such former employment.

Maine Bar Rule 3.5(b)(2)(ii) *Withdrawal from Employment, Mandatory Withdrawal:*

> (2) A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if:
> (ii) He knows, or should know, that his continued employment will result in a violation of these Rules;

CERTIFICATE OF SERVICE

I, James Martin Dineen, Respondent-Appellant *Pro Se* in the foregoing matter, do hereby certify that I have this day caused service of two (2) copies of the within brief and one (1) copy of the accompanying appendix to be made upon the Petitioner-Appellee, Board of Overseers of the Bar, by mailing same to Petitioner's attorney, J. Scott Davis, Esq., addressed to him at P.O. Box 1820, Augusta, Maine 04330.

Dated at Kittery, Maine, this twenty-first day of June, 1985.

JAMES MARTIN DINEEN
Respondent-Appellant Pro Se

JAMES J. FITZPATRICK
Attorney for Respondent-Appellant